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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on	)	
Universal Service	)	

PETITION FOR RECONSIDERATION OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY OF ARGUMENT

Nextel urges the Commission to declare that commercial mobile radio service ("CMRS") is a jurisdictionally interstate service and will be treated as such when contributing to the support of universal service. CMRS is a service for communicating with individuals and groups of people who are on the move. It would be economically and perhaps even technically infeasible to determine and record when a CMRS call is crossing or is not crossing a state line. Many customers will begin a call in one state and complete it in another state.

Congress recognized the interstate character of CMRS in 1993, when it enacted the Omnibus Budget Reconciliation Act to facilitate the development of CMRS services and promote regulatory parity. The Telecommunications Act of 1996 ("the '96 Act"), among many other provisions, required the Commission to adopt explicit competitively neutral rules to fund universal service. Although the *Universal Service Order* adopted rules by the date set by Congress, the Commission failed to give effect to statutory provisions that distinguish CMRS providers from other providers of telecommunications services. Instead, the Commission unlawfully found that states have authority over CMRS for purposes of establishing and administering state universal service programs. Nextel does not maintain that it may not be required to support universal service. However, the legal framework established by Congress permits only the Commission to impose such requirements.

CMRS is an inherently interstate service that cannot be subdivided among multiple state jurisdictions, *i.e.*, CMRS should be treated as a 100 percent interstate service.

However, if the Commission is unwilling to classify CMRS as interstate service for universal service purposes, it should provide a simple, straightforward method by which the Commission and the 50 states can apportion CMRS revenues among 51 jurisdictions when applying universal services levies, and it should recognize that, above a certain level, any such levy would constitute a barrier to entry.

The *Universal Service Order* does not prescribe or even suggest what methodology a CMRS provider should follow to apportion its revenues among the federal jurisdiction and the 50 state jurisdictions. The Commission's approach could cause the several states to establish inconsistent jurisdictional bases that result in multiple, inconsistent assessments in violation of long-recognized constitutional and legal principles.

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PETITION FOR RECONSIDERATION OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. Section 1.429, hereby submits this petition for reconsideration in response to the Report and Order on Universal Service adopted by the Federal Communications Commission ("the Commission") on May 7, 1997.[1/]

I. Introduction

Nextel urges the FCC to declare that commercial mobile radio service ("CMRS") is a jurisdictionally interstate service and will be treated as such when contributing to the support of universal service. If the Commission is unwilling to make such a declaration, it should provide a simple, straightforward method by which the Commission and the 50 states can apportion CMRS revenues among 51 jurisdictions when applying universal

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1/ *See* In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order* (FCC 97-157, released May 8, 1997) ("Universal Service Order").

service levies, and it should recognize that, above a certain level, any such levy would constitute a barrier to entry.

The *Universal Service Order* holds that CMRS providers may be required to contribute to state universal service funds, but it does not explain how such assessments would be implemented. By leaving the states free to formulate their own interpretations, the Commission has exposed CMRS providers to the possibility of duplicative assessments based on mutually conflicting or overlapping accounting methodologies. This problem is exacerbated by the inherently mobile nature of the vast majority of CMRS services, providing communications for "people on the go" without regard to political boundaries.

The simplest remedy to this problem would be an acknowledgment by the Commission that CMRS is an inherently interstate service that cannot be subdivided among multiple state jurisdictions, *i.e.*, that CMRS should be treated as a 100 percent interstate service. As discussed below, the simplest remedy is the only lawful remedy.

II. Background

The *Universal Service Order* establishes a federal fund for the support of universal service and acknowledges that states may establish state funds to support universal service as well. The Commission ruled that CMRS providers may be required to contribute to support state and federal universal service programs.[2/] A CMRS carrier's contribution to

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[2/] *Universal Service Order* at ¶791.

support federal telecommunications discounts to eligible schools, libraries, and health care providers will be assessed by the Commission based on the carrier's interstate and intrastate telecommunications revenues from end users.[3/] States are now able to, and some have, also imposed assessments.[4/] In contrast with the support program for schools and libraries, contributions to federal rural, insular, and high cost and low-income support mechanisms will be based only on interstate revenues.[5/] The general expectation is that state universal service levies for the support of high cost areas and low-income users will be based on intrastate revenues of telecommunications service providers.

Nextel is the nation's largest provider of traditional and wide-area Specialized Mobile Radio ("SMR") services. Traditional SMR services are primarily "dispatch communications," which offer users the capability to communicate simultaneously with a fleet of vehicles and mobile units through limited geographic areas. Wide-area SMR services are a highly evolved version of the same service, consisting of digital telecommunications systems that offer consumers dispatch capabilities over much broader geographic areas, along with a unique combination of fully integrated services: cellular telephone service, private network dispatch (i.e., one-to-one communications that do not

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3/ *Id.* at ¶772.

4/ *See, e.g.,* Arizona State Corporation Commission, Order, Docket No. R-96-01 (released May 30, 1997); Georgia Public Service Commission, Order, Docket No. 5825-U (released July 3, 1997).

5/ *Universal Service Order* at ¶824.

make use of the public switched telephone network), instant conferencing, paging, text messaging, voice mail and call forwarding - all on a single handset with combined billing and customer support. Digital wide-area SMR systems improve the traditional service by significantly expanding the coverage area, providing extra security through the use of digital technology, and adding mobile telephone, paging and voice mail to the fleet dispatch service.

Nextel seeks reconsideration herein to address the Commission's fundamental error in establishing the universal service support obligations of CMRS carriers. The Commission erred in attempting to overlay bifurcated federal/state jurisdiction over common carrier wireline telephone service between fixed locations on carriers providing commercial mobile radio services. Congress recognized in the Budget Omnibus Reconciliation Act of 1993 that the basic defining characteristic of a mobile service -- the ability to meet the communications needs of people "on the move" --required that CMRS services operate under federal jurisdiction, rather than the differing regulations of the 50 states.

In the Budget Act, Congress was well aware of the hindrance to competition of nearly ten years of state rate and entry regulation of cellular carriers, and expressly preempted such jurisdiction over CMRS providers. It expressly provided that states could regain rate authority only if a CMRS service became a substantial substitute for a ubiquitous landline service with market power. Similarly, Congress limited state

imposition on CMRS carriers of universal service contributions unless such service were to become a substitute for landline service in a substantial part of a state. The point is that the Budget Act authorized CMRS carriers to offer competitive wireless services under a single federal regulatory structure free of the complications of differing state regulation. The '96 Telecom Act did not change these provisions; therefore, the Commission's decision to subject CMRS providers to state universal service levies on intrastate revenues is in error and must be corrected.

III. Exposing CMRS to State Universal Service Levies Is Unlawful

Congress recognized the interstate character of CMRS in 1993, when it enacted the Budget Act to facilitate the development of CMRS services and promote regulatory parity.[6/] The Telecommunications Act of 1996 ("the '96 Act"), among many other provisions, required the Commission to adopt explicit competitively neutral rules to fund universal service, by May 8, 1997.[7/] Although the *Universal Service Order* adopted rules by the date set by Congress, as to CMRS providers the Order is arbitrary, capricious and unlawful.[8/]

Specifically, the Commission failed to give effect to statutory provisions that distinguish CMRS providers from other providers of telecommunications services. Instead,

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6/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI §6002(b), 107 Stat. 312 (1993) ("Budget Act").

7/ *See* 47 U.S.C. §254(a)(1)

8/ *See* 5 USC § 706(2)(A).

the Commission unlawfully found that states have authority over CMRS for purposes of establishing and administering state universal service programs. As explained more fully below, Nextel does not maintain that CMRS carriers may not be required to support universal service. However, the legal framework established by Congress permits only the Commission, and not the individual states, to impose such requirements.

The *Universal Service Order* does not prescribe or even suggest what methodology a CMRS provider should follow to apportion its revenues among the federal jurisdiction and the 50 state jurisdictions. The Commission's approach could cause the several states to establish inconsistent jurisdictional bases that result in multiple, inconsistent assessments in violation of long-recognized constitutional and legal principles.[9/] For CMRS, this infirmity exists whether service is provided over a network that is entirely intrastate or one that is partly interstate. Moreover, it must be recognized that wireless calls may become interstate based on the location of the called and calling parties as well as the facilities and routing used on the call.[10/]

In 1993, Congress recognized that it is inherently impossible to disentangle the intrastate aspects of CMRS from its predominantly interstate aspects, and enacted Section

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9/ *See Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930).

10/ Early in the century, the Supreme Court found that a message beginning and ending in the same state is, nevertheless, interstate if it is routed through another state. *Western Union Telegraph Co. v. Speight*, 254 U.S. 17 (1920) ("Speight").

332(c)(3) of the Communications Act,[11/] which begins, "Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service . . ." Congress also amended Section 2(b) of the Communications Act, the provision that is the basis for all state authority over communications common carriers.[12/] The Budget Act amendments to Section 2(b) eliminate state substantive regulatory authority over CMRS. Indeed, a reading of Section 332(c)(3) reveals that the states are only left with authority over "other terms and conditions of service."

The amendment to Section 2(b) is especially significant because Section 2(b) is the source for state authority over intrastate common carrier communications. In *Louisiana P.S.C. v. F.C.C.*,[13/] the Supreme Court explained that the legislative history of Section 2(b) reveals that it was proposed by state regulators in reaction to the Court's decision in the so-called Shreveport Rate Case,[14/] which held, among other things, that the Interstate Commerce Commission had the power to order an increase in certain intrastate railroad rates. The Court explained in *Louisiana*, however, that Section 2(b) did not merely address

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11/ 47 U.S.C. § 332(c)(3).

12/ 47 U.S.C. § 152(b).

13/ 476 U.S. 355 (1986).

14/ *Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342 (1914) (*"Shreveport"*).

rate issues; in drafting the section, Congress recognized that it was addressing fundamental and broad-ranging issues of federal jurisdiction over intrastate communications.[15/]

In circumscribing state power contained in Section 2(b) for mobile radio communications, therefore, Congress revived the Commission's jurisdiction over mobile radio services. While doing so, however, Congress also curtailed state authority over CMRS with respect to universal service. Concerning universal service, the Telecom Act reads as follows:

> "Nothing in this subparagraph [Section 332(c)(3)] shall exempt providers of commercial mobile service (*where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State*) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."[16/]

Thus, where CMRS services are *not* a substitute for landline telephone exchange service for a substantial portion of the communications in a state, CMRS providers *are* exempt from state-mandated universal service assessments based on the carriers' intrastate revenues.[17/]

[15/] *Louisiana*, 476 U.S. at 372. *Accord*, National Assn. of Regulatory Utility Commissioners v. F.C.C., 880 F2d 422 (1989) ("*Inside Wiring*"). These cases contradict the *Universal Service Order*'s assertion that Section 2(b) only implicates rate regulation. *See Universal Service Order* at ¶821.

[16/] *Id.* (emphasis added).

[17/] To the extent that certain rural radiotelephone services, licensed under Part 22, Subpart F of the Commission's Rules provide a substitute for extending prohibitively-

(continued...)

In drawing a distinction between CMRS and landline local telephone service, Congress expressly chose to exempt CMRS providers from state-imposed universal service obligations. Although "the '96 Act" specifically empowered this Commission to adopt universal service rules for interstate services, it did not authorize states to impose similar requirements upon CMRS providers. CMRS operators do not escape the obligation to contribute to the support of universal service; they do so through a unitary federal mechanism rather than up to 50 varying state mechanisms. Congress specified this approach because it recognized that jurisdictional separations of traffic on mobile networks would be administratively burdensome, costly and complex, given that mobile wireless networks will, at any one moment have an unpredictable and constantly changing mix of calls within and across state boundaries.

The '96 Act did not change this approach. In "the '96 Act," Congress adopted section 254(f), which states:

> A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the

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17/ (...continued)
expensive basic landline telephone service to isolated rural areas, they may be subject to state universal service assessments and or service obligations.

> State to the preservation and advancement of universal service in that State.[18/]

The Commission has interpreted this language as providing that states may require CMRS providers to contribute to state universal service plans.[19/] Remarkably, the Commission provides no reasoning or analysis for this interpretation, except to say that the Joint Board on Universal Service adopted that interpretation, and so did the California PUC. The Commission agrees with them, but does not say why.[20/] With respect to another, similarly unsupported Commission directive, the U.S. Court of Appeals for the District of Columbia said, "The FCC's *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking."[21/] The same characterization applies to the *Universal Service Order*'s treatment of CMRS.

Indeed, the Commission also ignored comments that highlighted why the specific enactments about CMRS override more general provisions contained in the Telecom Act.

18/ 47 U.S.C. § 254(f).

19/ Universal Service Order at ¶791.

20/ *Id.* The Joint Board provided no reasoned basis for its recommendation, either, as Nextel pointed out in its comments on the Joint Board's Recommended Decision.

21/ *Illinois Public Telecommunications Assn. v. F.C.C.*, Slip Op. No. 96-1394, decided July 1, 1997, at 15.

As the Cellular Telecommunications Industry Assn. demonstrated in its comments, the Supreme Court has consistently held that where Congress has spoken explicitly and precisely about a specific matter, the explicit language necessarily takes precedence over a later enacted more general provision.[22/] As the Supreme Court explained in *Radzonower*:

> The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.[23/]

In this case, the particular provisions in the 1993 enactment exempt CMRS providers from intrastate universal service obligations at this time, and are not overridden by a broad pronouncement in the '96 Act referring generally to the universal service obligations of telecommunications carriers.

Additionally, as Sprint PCS showed in its reply comments, the states' lack of authority to impose universal service obligations on CMRS providers was confirmed by a recent Connecticut Superior Court finding that, "by expressly exempting from preemption

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[22/] CTIA Reply Comments, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment." (citation omitted)).

[23/] *Radzanower* at 153.

the assessments which are made on cellular providers in a state in which cellular service is a substitute for landline service, Congress in section 332(c)(3)(A) left no ambiguity that cellular providers in states in which cellular is not a substitute for landline services fall under the umbrella of federal preemption."[24/] This decision confirms that the relevant language of section 332(c)(3) has survived the subsequent adoption of section 254(f), and continues to exempt CMRS providers from state universal service levies.

IV. Even if Exposing CMRS to State Universal Service Levies Were Lawful, Doing So Would Be Contrary to the Public Interest

In some lesser developed countries, mobile telephones are being used as a substitute for landline telephone service. While wireless telephony could eventually become a viable substitute for landline telephone service in some areas of this country, particularly in rural areas, that is rarely the case today because rural telephone carriers are heavily subsidized. The *Universal Service Order* states that support for rural wireline carriers will gradually shift to a system based on forward-looking economic cost at a date the Commission will set "after further review, but in no event starting sooner than January 1, 2001."[25/] Until that transition occurs, one can only speculate whether CMRS will emerge become a "substitute"

[24/] Reply Comments of Sprint Spectrum L.P., *citing Metro Mobile CTS et al. v. Connecticut Depart. of Public UTILITY Control,* No. CV-95-05512758, 1996 Conn. Super. LEXIS 3326 (Conn. Super. Ct. Dec. 9, 1996).

[25/] *Universal Service Order* at ¶204.

for local wireline service or whether, as appears more likely, CMRS will continue to develop as a new and entirely different kind of medium.

CMRS as it exists today in the United States is no more a substitute for wireline telephone service than airplanes are a substitute for trains. Traditional telephone service provides a means of calling fixed locations. CMRS carriers offer differentiated services for communicating with individuals and groups of people who are on the move. Because CMRS calls are often made from moving vehicles; the state lines crossed or not crossed often change in the midst of conversations. A call initiated in downtown Washington, D.C. could continue as the caller crosses the Arlington Memorial Bridge into and, via major commuter routes into Maryland. On Nextel's system, the call would be routed from the originating base station or "cell site" through Nextel's mobile switching center in suburban, Maryland. Indeed, that same switch routes calls originating and terminating throughout the greater Baltimore-Washington area[26/]. Moreover, while a Nextel customer may originate a call in Washington, D.C., the customer's mobile unit could have a Maryland, D.C. or Virginia area code and telephone number. If the customer with a Maryland number initiates a call in D.C. which is terminated in Maryland, is that an intrastate or interstate call? Complicating the analysis further is the scenario in which a customer in Northern Virginia, for example, initiates a call which is carried by a base station located across the Potomac River in the District. Even if the called party is also

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[26/] It also supports Nextel's service in greater Philadelphia.

located in Virginia, it is unclear whether this is an intrastate call between two Virginia customers, or an interstate call between two Virginia customers, or an interstate call because the network carrying it uses facilities based in D.C. (the base station) and Maryland (the mobile switching center) as well as Virginia.

These type of separations problems are exacerbated further when a carrier like Nextel constructs a nationwide network offering automatic service to customers throughout its network without any roaming charges. Similarly, Nextel's Direct Connect group calling function enables a subscriber to instantly reach all members of a defined group throughout, for example, the Baltimore/Washington/Northern Virginia market, regardless of political jurisdiction. The ability to easily and automatically reach a mobile subscriber without the caller having to know the subscriber's location is a basic reason why Congress specified that CMRS services should develop under federal jurisdiction free from state regulatory actions that could contravene the development of these capabilities. Moreover, CMRS carriers typically do not have the administrative and billing capabilities necessary to identify and record whether calls should be allocated to the intra- or interstate jurisdiction for universal service or other regulatory purposes.

From a jurisdictional perspective, CMRS-space is like cyberspace. Just as Internet communications do not follow conventional wireline circuit switched architectures, calls to CMRS transceivers are typically completed without regard to jurisdictional boundaries. Attempting to force such systems into the jurisdictional paradigm historically used for fixed

local exchange services would not only involve enormous administrative and computer processing costs but, for most users, would constitute an unacceptable invasion of privacy. Yet, just such a database might have to be constructed if the Commission does not reconsider and change the treatment of CMRS operators announced in the *Universal Service Order.*

Even if it were technically feasible to build such an invasive tracking system and to produce billing reports that parsed mobile, multi-party conversations into identifiable state-by-state segments, and to apply state universal service levies on that basis, the effects on the emerging CMRS industry and its users and potential users would be devastating.

To date, existing indications are that a number of states will apply extraordinarily high universal service levies. Kansas, for example, issued a decision last December that could result in a universal service levy on intrastate retail revenues of CMRS providers amounting to 14.1 percent per year.[27/] Such levies could drag rates upward for other states if it proved impracticable or confusing to consumers to establish different CMRS service rates for neighboring areas. Thus, for example, Airtouch reports that California has established a 7 percent levy on telecommunications revenues.[28/] If two adjacent states adopted assessment

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[27/] In the Matter of a General Investigation into Competition Within the Telecommunications Industry in the State of Kansas, State Corporation Commission of Kansas Docket No. 190, 492-U, 94-GIMT-478-GIT, *Order* (issued Dec. 27, 1996), at 36.

[28/] Airtouch Reply Comments, *citing California Public Utility Commission*, Decision No. 96-10-066 (adopted Oct. 25, 1996).

rates that differ as much as California's and Kansas's do, users in low-levy states could find their rates indirectly affected by their neighbors' higher levies.

Whatever variations occur among the states, it is increasingly likely that, on average, state universal service levies will substantially exceed the federal levy. States are also imposing a number of additional taxes and unfunded mandates on CMRS providers. For example:

- Some states still require CMRS providers to file and maintain tariffs regardless of the Commission's preemption authority under Section 332.
- States and localities are imposing numerous types of fees on CMRS providers, including certain "franchise" fees and rights-of-way fees at the local level, most of which are based on carriers' gross receipts.
- Some states are seeking to impose intangible taxes on FCC licenses based on the value of the licenses.
- Some localities are charging CMRS providers annual registration fees for the "privilege" of siting towers in their territories.
- Numerous county, city and townships have imposed outright moratoriums that prevent the siting of CMRS transmitters.
- State and local governments are rapidly adopting 911 and E911 fees for CMRS carriers as well as taxes and surcharges to support implementing number portability.

While some of these state requirements may be illegal and will eventually be overturned, the process involves significant litigation expenses for CMRS providers. In the meantime, the federal government is also imposing costly unfunded mandates on CMRS providers, such as

obligations to provide local number portability, emergency 911 services, and obligations to contribute to the Telecommunications Relay Services fund.[29/]

Sustaining such costs would be burdensome even for companies that operate in a monopoly environment and provide services through established networks that few customers can choose to do without, even if prices were substantially increased. Regulatory costs always have a depressant effect on usage, but the depressant effect is greater on services with a high elasticity of demand.[30/] CMRS fits that description because most users consider it a discretionary choice. CMRS providers are especially vulnerable to major downturns in demand because most are still in the process of building out their networks. Nextel, for example, has over the past few years initiated service in more than 250 cities across the United States, but its ability to extend its networks virtually nationwide depends upon continued access to the capital markets. CMRS competitors will be seriously hindered if the Commission and the states impose excessive taxes, quasi-taxes, and unfunded mandates on the mobile radio industry.

[29/] *See* Telephone Number Portability, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 (1996); In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102; RM-8143, 11 FCC Rcd 18676 at ¶ 76 (released July 26, 1996); In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996, Notice of Inquiry, WT Docket No. 96-198, FCC 96-382 (September 26, 1996).

[30/] *See* Hausman, Tariff, and Belinfante, "The Effects of the Breakup of AT&T on Telephone Penetration in the United States," *American Economic Review*, 83:2, 178-184 (calculating the elasticity of demand for network access compared with the elasticity of demand for network usage).

In sùm, Nextel believes that it would be counterproductive to attempt to separate CMRS services into multiple jurisdictional components subject to regulation by 50 state commissions. Even if such a separation could be accomplished, both the implementation process and the end results would be profoundly negative. While Nextel respects the Commission's instinct for comity and cooperation with the states, in this situation those commendable goals are far outweighed by Congress' overriding goal of fostering a robustly competitive CMRS industry for the benefit of the public.

V. If The Commission Adheres To Its Decision, It Should Establish A Regulatory Framework That Limits The Harmful Effects Of State Regulation.

Even to the extent that states may lawfully administer intrastate universal service funds, Congress foresaw the need for federal regulations to provide a framework for the states' activities. The statutory subsection dealing with that topic begins, "A State may adopt regulations *not inconsistent with the Commission's rules* to preserve and advance universal service."[31/] Should the Commission continue along the course it has embarked upon, and permit states to apply universal service levies to CMRS operators, there will be an even greater need for federal rules and procedures to limit the adverse effects of unrestrained state levies on the development and growth of CMRS services. The Commission must prevent duplicative assessments levied by multiple jurisdictions, and it should recognize that, at a certain absolute level, universal service levies can constitute an

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31/ 47 U.S.C. § 254(f).

effective bar to entry in violation of the Communications Act, considered either in isolation or in combination with other fees, taxes, and unfunded state mandates of the kind mentioned above.

If states are permitted to assess CMRS revenues, the only way to prevent the imposition of duplicative levies is to establish a process that apportions revenues between the state and federal jurisdictions and, on the state side, among the various states. The Commission and the courts have long recognized that this process is an inexact science and that the pursuit of accuracy in any such process must be limited by a practical avoidance of excessive administrative costs.[32/]

If the Commission chooses to apply a fixed allocator to determine what proportion of revenues should be attributed to the federal jurisdiction, as it has done for other services in the past, it should assume that at least 50 percent of CMRS revenues are interstate. Such a number would not be based on any detailed tabulation of traffic characteristics, because no such tabulations exist. Rather it would split the difference between the state and federal jurisdictions by balancing the inherently interstate characteristics of CMRS with the Commission's view of state commissions' interests.

[32/] *See, e.g., American Telephone & Telegraph Col. and the Associated Bell System Companies Charges for Interstate and Foreign Communication Service,* 9 FCC 2d 30 (1967) at ¶¶255 and 258, *citing Smith v. Illinois Bell Tel. Co.,* 282 U.S. 133 (1930), and *Colorado Interstate Gas Company v. Federal Power Commission,* 324 U.S. 581, 589 (1945) (separations procedures do not require extreme nicety" or a "slide rule" approach).

Beyond a certain level, universal service levies would have the effect of prohibiting the ability of a CMRS operator to provide telecommunications service, in violation of Section 253(a) of the Communications Act.[33/] In no event should the Commission permit a state to apply a state universal service levy that is more than twice the federal levy. Up to that level, the Commission could choose to offset the effects of an excessive state levy by reducing the federal levy. Beyond that level, the only effective alternative for the Commission would be to issue a preemption order based on Section 253(a) if the state raises its levy to a level that cannot be offset by corresponding decreases in the federal levy.

VI. Conclusion

The Commission should find that, as a matter of law, CMRS providers are not subject to state universal service levies. If, contrary to law, the Commission finds that it has legal discretion to expose CMRS providers to state universal service levies, the Commission should refrain from doing so on policy grounds. If, contrary to all of those considerations, the Commission decides to permit states to impose universal service levies on CMRS, it should establish the processes described above to apportion revenues and

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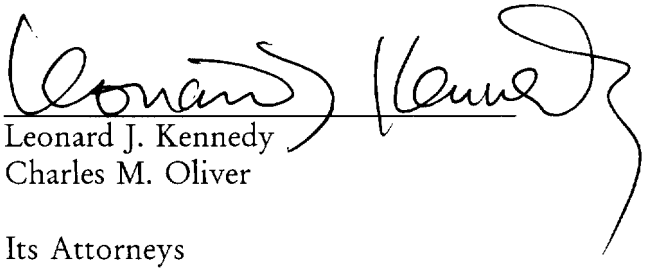
33/ 47 U.S.C. § 253(a).

levies among the various jurisdictions involved, and it should limit the amount of universal service levies that any state can impose on CMRS operators.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

By: 
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July 17, 1997